IN THE COURT OF APPEALS 12/03/96

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00340 COA

JOHN DONALD DICKEY, JR.

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. GEORGE C. CARLSON JR.

COURT FROM WHICH APPEALED: YALOBUSHA COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

CLAUDE M. PURVIS

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: JEFFREY A. KLINGFUSS

DISTRICT ATTORNEY: JOHN CHAMPION

NATURE OF THE CASE: CRIMINAL: CONSPIRACY TO DISTRIBUTE AND SALE OF LESS THAN ONE OUNCE OF MARIJUANA

TRIAL COURT DISPOSITION: CT I CONSPIRACY: CT II SALE OF LESS THAN 1 OUNCE OF MARIHUANA: CT I SENTENCED TO SERVE 5 YRS IN THE MDOC; CT II SENTENCED TO SERVE 3 YRS IN THE MDOC, PAY A FINE OF $1,000.00

BEFORE BRIDGES, P.J., KING, AND PAYNE, JJ.

BRIDGES, P.J., FOR THE COURT:

John Donald Dickey, Jr. appeals from a two-count indictment from the Circuit Court of Yalobusha County. Dickey was found guilty of conspiracy to distribute and the sale of less than one ounce of marijuana under an enhanced second offender violation. Dickey appeals arguing (1) that statements made by a prospective juror were prejudicial, (2) that the State failed to prove venue, and (3) that the court erred in allowing the introduction of a plastic bag of marijuana due to a faulty chain of custody.

FACTS

On December 16, 1991, Willie Charles Rockette contacted the Bureau of Narcotics in order to pose as a confidential informant. That evening, Rockette met with Lt. Conner and Lt. Corbin at a store in Water Valley. Rockette and Lt. Conner left in one car, followed by Lt. Corbin in a separate vehicle who monitored their actions by radio. Lt. Connor and Rockette saw John Dickey at the Water Valley Chevron station and spoke to him regarding the purchase of marijuana. Rockette, Lt. Connor, and Dickey traveled in Dickey's car about one-half mile to the home of Edward Scanlon. Dickey entered Scanlon's home and returned with two plastic bags of marijuana, which he sold to Lt. Conner. Lt. Corbin had lost contact at this point, but reunited with Lt. Conner after the offense took place.

ARGUMENT AND DISCUSSION OF THE LAW

I. WHETHER THE CIRCUIT COURT ERRED IN FAILING TO QUASH THE VENIRE DUE TO STATEMENTS MADE BY A PROSPECTIVE JUROR.

During voir dire, an exchange took place between a prospective juror and the court which Dickey argued was prejudicial to his case. Dickey argued that it was clear that the statements made by the prospective juror were made to show it was "common knowledge" that Dickey was a drug dealer. The exchange went as follows:

> Court: Anybody that knows anything about the case or thinks they might know something about the case?
>
> Juror: Does hearsay mean anything?
>
> Court: Yes, sir.
>
> Juror: You asked if we know something about it?

Court: Alright, Mr. Swearengen, I'm not going to ask you to repeat what you may have heard. I assume that you have heard something from talking with somebody else...

Juror: I was fixin to say, you know, it's common knowledge.

Court: All right, well---all right---

Juror: But you never know---

Court: Excuse me. Let me cut you off. I have to ask you specific questions since you've indicated you know something about the case. How long ago has it been that you 've heard anything about the case? This is stated to have occurred in December 1991. Has it been that long?

Juror: Well, I didn't know about the case. I just knew the charges---

Court: Okay, you knew the charges. So based on that, does that cause you at this point in any way Mr. Swearengen, to be prejudging this case for or against the State or for or against the Defendant?

Juror: It would be more or less against the Defendant.

Court: All right, you feel like that as you stand there at this point that you would be leaning against the Defendant?

Juror: Yes, sir.

Court: Is that right?

Juror: Yes, sir.

The Appellant, Dickey, argues this exchange was prejudicial, and that the judge erred by not questioning the remaining venire concerning the influence of prejudicial statements made by a prospective juror.

The State's position rested on the fact that the Appellant did not object to the prejudicial comment, and argued that this assignment of error is barred from review.

The Mississippi Supreme Court has said that where the voir dire conducted by the court clearly discloses that "no juror felt or believed that the statement made . . . would prejudice him or prevent him from being a fair and impartial juror," the matter was left to the discretion of the court. *Hopson v. State*, 625 So. 2d 395, 403 (Miss. 1993) (citing *Robinson v. State*, 253 So. 2d 398, 400 (Miss. 1971)). Furthermore, once the trial judge is satisfied that the potential jurors are without prejudice and they could be fair and impartial jurors, it is within the discretion of the court to make the final determination as to whether the panel should be quashed. *Id.* at 403.

After the voir dire, the judge explained that the juror's comment regarding "common knowledge" dealt with the knowledge that Dickey had been charged, not that it was "common knowledge" that he was a drug dealer. The judge went on to say:

> I don't think that the comment, either expressed or implied, would be sufficient to quash the jury panel. Over and over again the jurors were questioned not only by me but by the lawyers regarding their responsibility, if chosen, to decide the case on the evidence and the law and I'm satisfied they could do that. I think when you take the totality of the responses it was not prejudicial, could not be deemed to be prejudicial to the defendant.

Because of this commentary, it is safe to say the judge was satisfied that the jurors were not prejudiced. As already explained, it is at the discretion of the court whether or not a jury panel will be quashed, and in this instance, the judge found that it was not necessary to quash this jury.

Also, as the State argued, the defense failed to make a contemporaneous objection on the record. "The rule is well established that a contemporaneous objection is necessary to preserve the right to raise an error on appeal." *Mack v. State*, 650 So. 2d 1289, 1301 (Miss. 1994) (citing *King. v. State*, 615 So. 2d 1202, 1207 (Miss. 1993)). Therefore, this error is procedurally barred because of the defense's failure to object, and regardless of this failure to object, it is at the court's discretion whether or not it is necessary to quash a jury panel.

II. WHETHER THE STATE PROVED VENUE.

On appeal, Dickey argues that the State failed to prove venue. Venue may be proved either

circumstantially or by inference. *Jones v. State,* 606 So. 2d 1051, 1055 (Miss. 1992) (citing *Griffin v. State*, 381 So. 2d 155, 158 (Miss. 1980)). The issue of venue turns on the facts. *Mackbee v. State,* 575 So. 2d 16, 38 (Miss. 1990). Article 3, Section 26, of the Mississippi Constitution provides that a defendant has a right to be tried "by an impartial jury of the county where the offense was committed." *Fairchild v. State*, 459 So. 2d 793, 799 (Miss. 1984).

Applying the law to the facts in the case at bar, this issue is wholly without merit. The lower court's findings of fact show that venue was proved. There were three witnesses for the State that testified on the record that the drug purchase took place in Water Valley, which would prove venue because it is within the second judicial district of Yalobusha County. Lt. Conner testified that the operation took place in Water Valley. Randy Corbin from the Bureau of Narcotics testified that the Chevron station where they first saw Dickey was in Water Valley. Willie Rockette testified that after he and Lt. Conner saw Dickey at the Chevron station, they spoke with him and followed him to the nearby Gulf station, also in Water Valley. From here, they joined Dickey in his vehicle, and rode one-half mile to Scanlon's house, where they purchased the marijuana.

Scanlon's house was merely one-half mile from the Gulf station, which was testified to as being located in Water Valley in Yalobusha County. During the trial, the court acknowledged that one-half mile in any direction from the Gulf station was still within the perimeters of Water Valley in Yalobusha County. Therefore, Scanlon's house must be located in Yalobusha County, which is within the appropriate district for purposes of venue. As per Mississippi Rule of Evidence 201(b), the court took judicial notice of the fact that Water Valley was within the second judicial district of Yalobusha County, Mississippi. As stated in *Bearden v. State*, "This Court will take judicial notice that a certain town is in a given county." *Bearden v. State*, 662 So. 2d 620, 625 (Miss. 1995); *Smith v. State*, 646 So. 2d 538, 549 (Miss. 1994) (citations omitted).

From the above facts, it is apparent that Scanlon's house is within the second judicial district of Yalobusha County, and venue was proper. We affirm the lower court.

> III. WHETHER THE STATE PROPERLY ESTABLISHED THE CHAIN OF CUSTODY FOR THE MARIJUANA FROM THE DAY IT WAS SOLD TO THE TIME OF TRIAL.

The Appellant argues that the State failed to establish properly the chain of custody of the marijuana admitted into evidence. The test for determining whether a proper chain of custody has been shown is whether there is any reasonable inference of probable tampering or substitution of evidence. *Grady v. State*, 274 So. 2d 141, 143 (Miss. 1973). There was no inference of a mistaken bag, only the defense counsel's speculation that Lt. Corbin could have gotten this bag confused with another.

In the court's findings of fact, the judge asserts that the marijuana was purchased from the Defendant by Lt. Conner, who marked it and turned it over to Lt. Corbin. Lt. Corbin testified that he received the evidence from Lt. Conner, and the next day transferred it to the crime lab. Mr. Smiley from the lab testified that he received the evidence and ran an analysis of the substance, determining that it was marijuana.

The only prejudice asserted at trial by defense counsel was that the State's case could have been deficient because Lt. Corbin did not mark the bag himself, and therefore he could have mistaken it for another bag. This was unlikely because the bag was marked by Lt. Conner's handwriting. She, and not Corbin, was the agent in charge of handling the evidence initially, seizing it, and marking it. The court made findings of fact in the record showing the basis for admitting the evidence and supporting the proper chain of custody. Questions as to the chain of custody are within the sound discretion of the trial court, and will not be overturned on appeal except for an abuse of that discretion. *Wells v. State*, 604 So. 2d 271, 277 (Miss. 1992) *Morris v. State*, 436 So. 2d 1381, 1388 (Miss. 1983). We find no abuse of discretion here.

THE JUDGMENT OF THE YALOBUSHA COUNTY CIRCUIT COURT OF CONVICTIONS ON COUNT I OF CONSPIRACY TO DISTRIBUTE LESS THAN ONE OUNCE OF MARIJUANA WITHIN 1,000 FEET OF A SCHOOL AND SENTENCE OF FIVE YEARS UNDER SECOND OFFENDER STATUTE, SUSPENDED PENDING GOOD BEHAVIOR AND SHALL RUN CONSECUTIVELY TO SENTENCE IN COUNT II; COUNT II OF SALE OF LESS THAN ONE OUNCE OF MARIJUANA WITHIN 1,000 FEET OF A SCHOOL UNDER AN ENHANCED SECOND OFFENDER VIOLATION AND SENTENCE OF THREE YEARS, ALL IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, AND FINE OF $1,000 IS AFFIRMED. ALL COSTS OF APPEAL ARE TAXED TO THE APPELLANT.

FRAISER, C.J., THOMAS, P.J., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.